

EDDIE R. JIMENEZ (SBN 231239)  
ERIN L. LANEY (SBN 259863)  
MATTHEW R. CLARK (SBN 271054)  
PITE DUNCAN, LLP  
4375 Jutland Drive, Suite 200  
P.O. Box 17933  
San Diego, CA 92177-0933  
Telephone: (858) 750-7600  
Facsimile: (619) 590-1385

Attorneys for JPMORGAN CHASE BANK, NATIONAL ASSOCIATION

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

In re Case No.11-47682-WJL

ZOE NADINE GARLICK , Chapter 7

Debtor(s). | R.S. No. | ELL - 347

**MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)**

DATE: November 9, 2011  
TIME: 10:30 AM  
CTRM: 220

1300 Clay Street, Suite 300  
Oakland, CA 94604-1426

JPMorgan Chase Bank, National Association<sup>1</sup> ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 2666 79th Avenue, Oakland, California 94605.

On or about July 20, 2011, Zoe Nadine Garlick ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and John Kendall was appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

<sup>1</sup> This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and  
2 362(d)(2).

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

6 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
7 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**  
**NO EQUITY**

8 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the  
9 debtor does not have any equity in the property and the property is not necessary to the debtor's  
10 effective reorganization.

11 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:  
12 § 362(d)(2) reflects congressional intent to allow creditors to  
13 immediately proceed against the property where the debtor has no  
14 equity and it is unnecessary to the reorganization, even where the  
debtor can provide adequate protection under § 362(d)(1).  
(Emphasis added).

15 Id. at 610 (emphasis added).

16 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court  
17 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all  
18 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief  
19 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194  
(9th Cir. 1984).

21 An appropriate cost of sale factor should also be added to determine if the debtor has  
22 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.  
23 283, 289 (Bankr. S.D. Cal. 1982).

24 On or about April 26, 2007, Debtor, for valuable consideration, made, executed and  
25 delivered to Washington Mutual Bank, FA ("Lender") a Note in the principal sum of  
26 \$203,800.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal  
27 and interest payments commencing June 1, 2007, and continuing until May 1, 2037, when all  
28 outstanding amounts are due and payable. The Note provides that, in the event of default, the

1 holder of the Note has the option of declaring all unpaid sums immediately due and payable. A  
2 copy of the Note is attached to the Declaration in Support of Motion for Relief From Automatic  
3 Stay as exhibit A and incorporated herein by reference.

4 On or about April 26, 2007, the Debtor made, executed and delivered to Lender a Deed  
5 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly  
6 described as 2666 79th Avenue, Oakland, California 94605 (the "Real Property"), which is  
7 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and  
8 costs incurred as a result of the Debtor's bankruptcy case may be included in the outstanding  
9 balance under the Note. The Deed of Trust was recorded on May 7, 2007, in the Official  
10 Records of Alameda County, State of California. A copy of the Deed of Trust is attached to the  
11 Declaration in Support of Motion for Relief From Automatic Stay as exhibit B and incorporated  
12 herein by reference.

13 On or about September 25, 2008, WAMU was closed by the Office of Thrift  
14 Supervision and the FDIC was named receiver. As authorized by Section 11(d)(2)(G)(i)(II) of  
15 the Federal Deposit Insurance Act, 12 U.S.C. Section 1821(d)(G)(i)(II), the FDIC, as receiver  
16 of WAMU, may transfer any asset or liability of WAMU without any approval, assignment, or  
17 consent with respect to such transfer. Pursuant to the terms and conditions of a Purchase and  
18 Assumption Agreement between the FDIC as receiver of WAMU and Movant dated September  
19 25, 2008, Movant acquired certain of the assets, including all loans and all loan commitments of  
20 WAMU. As a result, on September 25, 2008, Movant became the owner of the loans and loan  
21 commitments of WAMU. A copy of the Affidavit of the FDIC is attached to the Declaration in  
22 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by  
23 reference.

24 The obligation under the Note is in default as of June 1, 2011, for failure to make  
25 payments to Movant. As of July 28, 2011, the principal amount owing under the Note is the  
26 approximate sum of \$193,021.47. Further, Movant has incurred additional post-petition  
27 attorneys' fees and costs in bringing the instant Motion. This is an approximate amount for  
28 purposes of this Motion only, and should not be relied upon as such to pay off the subject loan

as interest and additional advances may come due subsequent to the filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel. Moreover, the total outstanding payments due under the Note are in the approximate sum of \$3,764.49. An additional payment will come due on September 1, 2011, and on the 1st day of each month thereafter until the Loan is paid in full. A copy of the contractual payment accounting pursuant to Local Rule 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit D and incorporated herein by reference.

II.

## **RELIEF FROM STAY**

### **LACK OF EQUITY AND SURRENDER**

11        Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and  
12 Statements, the fair market value of the Property is approximately \$150,000.00. A copy of the  
13 Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Declaration in  
14 Support of Motion for Relief From Automatic Stay as exhibit E.

Based on the above, Movant maintains that the equity in the Property is as follows:

|                               |                             |
|-------------------------------|-----------------------------|
| Fair Market Value:            | \$150,000.00                |
| Less:                         |                             |
| Movant's Trust Deed           | \$193,021.47                |
| First USA's 2nd Deed of Trust | \$156,954.00                |
| Costs of Sale (8%)            | <u>\$12,000.00</u>          |
| Equity in the Property:       | <u><u>\$211,975.47)</u></u> |

As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

23 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real  
24 Property in full satisfaction of Movant's secured claim. A copy of the Debtor's Statement of  
25 Intent is attached hereto as exhibit F.

26 | //

27 | //

III.

1                   **MOVANT IS ENTITLED TO RELIEF FROM THE**  
2                   **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**  
3                   **CAUSE - LACK OF ADEQUATE PROTECTION**

4                   Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to  
5 adequate protection of its interest in the Property.

6                   Movant submits that adequate protection in this case requires normal and periodic cash  
7 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed  
8 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

9                   Movant is informed and believes that Debtor is presently unwilling or unable to provide  
10 adequate protection to the Movant and there is no probability that adequate protection can be  
11 afforded to Movant within a reasonable time.

12                  By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.  
13 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

14                  WHEREFORE, Movant respectfully prays for an Order of this court as follows:

15                  1.         Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the  
16 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of  
17 Trust;

18                  2.         That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

19                  3.         Granting Movant leave to foreclose on the Real Property and to enforce the  
20 security interest under the Note and the Deed of Trust, including any action necessary to obtain  
21 possession of the Property;

22                  4.         Permitting Movant to offer and provide Debtor with information re: a potential  
23 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan  
24 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

25                  5.         Alternatively, in the event this court declines to grant Movant the relief requested  
26 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to  
27 reinstate and maintain in a current condition all obligations due under the Note and Deed of  
28 Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations

1 to pay when due (a) the monthly installments of principal and interest, as required under the  
2 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor  
3 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs  
4 incurred in the filing of this motion;

5       6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion  
6 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy  
7 law; and

8       7. For such other and further relief as the court deems just and proper.

9  
10 Dated: October 21, 2011

PITE DUNCAN, LLP

11  
12                     /s/ ERIN L. LANEY (CA SBN 259863)  
13 Attorneys for JPMORGAN CHASE  
14 BANK, NATIONAL ASSOCIATION  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28